No. 1227

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HUGH MADDEN and WILLIAM DONOHUE,
Appellants,

vs.

JENNIE C. McKENZIE,
Appellee.

BRIEF OF APPELLANTS.

Upon Appeal from the United States District Court for the District of Alaska, Third Division.

CLAYPOOL, STEVENS, KELLUM & COWLES,
Attorneys for Appellants.

EDWARD E. CUSHMAN,
Of Counsel.

The Filmer Bros. Co. Print, 424 Sansome St., S. F.

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In this case the plaintiff below brought complaint against the defendants, appellants here, alleging, that she had leased certain premises—a hotel of nineteen rooms—from them for one year, commencing September 23, 1904. A copy of the lease is set out, showing an agreed rental of $200 per month, in advance, lessee to permit no waste, and to put in certain permanent fixtures and to furnish fuel for heating the building during the term. That she remained in possession until the 29th of May, 1905, when she was by the defendants forcibly ejected and ousted. That she had complied with all conditions of the lease and had on May 23, 1905, paid a month's rent in advance from that date. That on the 29th of May,

1905, the defendants forcibly ejected and ousted her from the premises, and have ever since, and now do, forcibly and unlawfully withhold the possession from the plaintiff and assert the lease to be terminated and forfeited. That the defendants were insolvent. That unless the defendants were enjoined from withholding such possession and the same restored, the plaintiff would suffer irreparable loss. That plaintiff had no plain, adequate or speedy remedy at law. That she had been damaged in the sum of $500.

She prays a judgment decreeing her entitled to immediate possession of the property and the immediate return thereof. That defendants be restrained from disturbing her possession.

Upon this complaint a show cause order was issued, reciting that it appearing from the complaint to be a proper case for granting an injunction "restoring to plaintiff the possession of the premises," that if they, the defendants, failed to show cause, the Court would make an order restoring the plaintiff to the possession of the property described.

A motion to dismiss was then interposed on the ground that the Court was without jurisdiction; that it appeared from the complaint that plaintiff had a plain, speedy and adequate remedy at law, and that the complaint did not state sufficient facts to entitle plaintiff to the relief prayed.

This order was overruled; a demurrer was interposed including the same grounds of objection. This was overruled. An answer was then made admitting the execution of the lease, denying the forcible and unlawful ejec-

tion and ouster, admitting the month's rent paid May 23, 1905, but denying full compliance with the lease by plaintiff; admitting re-entry into possession without plaintiff's consent, and admitting that defendants assert the lease forfeit.

Insolvency of defendants is denied; also the allegation of irreparable loss and injury. Denies that there is no plain, speedy and adequate remedy at law, and denies plaintiff's damage in any amount.

The answer further sets up an affirmative defense admitting the lease. That the premises were entered and run by the plaintiff as a lodging-house, being the rooms on the second story of defendants' building, in the lower story of which they conducted a retail liquor business. That after entry upon the premises by the plaintiff the lease was modified by an oral agreement, by the terms of which plaintiff was to personally occupy and manage said rooming-house, and endeavor to keep it occupied by persons who would patronize defendants' bar; she to receive a commission on liquors sold. That all agreements were kept until May 28, 1905, when plaintiff broke her agreement and moved out and abandoned said premises, and enticed away the occupants to a rival place of business. That defendants notified plaintiff she had violated her contract and peaceably retook possession while she was out of possession, and still retained it. The answer recites the interests of defendants in the property, and charges a conspiracy between plaintiff and a competitor in business of defendants to destroy the latter's business by keeping said premises unoccupied.

The answer alleges the solvency of the defendant Donahue; alleges that he is worth $10,000 above debts and exemptions; alleges that plaintiff has a plain, speedy and adequate remedy at law; that defendants have been damaged in the sum of $1,000.

Upon the order to show cause, affidavits were filed upon behalf of defendants supporting their answer, giving details tending to support the conspiracy charge, and alleging that if allowed time fuller and more satisfactory proofs would be produced.

That plaintiff abandoned said premises and had acquiesced in defendants' re-entry by removing the remainder of her furniture thereafter. That defendants had refurnished said premises thereafter at great expense.

There were no counter-affidavits nor reply to the answer.

Plaintiff moved for judgment on the pleadings and a final judgment was granted, which recited that defendants had, "unlawfully and against the consent of plaintiff, taken possession of said premises," and had since so held possession. That the plaintiff was the owner of a legal estate for years in the premises. That the plaintiff was entitled to possession and costs.

Appeal has been taken from said judgment by the defendants and the following errors assigned:

"I.

That the Court erred in denying defendants' motion to dismiss the above-entitled cause.

II.

That the Court erred in overruling defendants' the re-
rer to plaintiff's complaint in said cause.

III.

That the Court erred in granting plaintiff's mot
judgment on the pleadings in said action.

IV.

That the Court erred in rendering and entering
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That the Court erred in granting plaintiff's motion for judgment on the pleadings in said action.

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That the Court erred in rendering and entering judgment against defendants in favor of plaintiff in said action."

AS TO THE ADEQUACY OF THE REMEDY AT LAW AND SUFFICIENCY OF THE COMPLAINT:

Chapter 32 of the Alaska Civil Code (Carter's Codes of Alaska, p. 210), made full provision for the recovery by ejectment of the possession of real property.

Chapter 99 of said Laws (Idem, page 350 et seq.), made provision for the summary recovery of the possession of real property in a forcible entry and detainer act.

These certainly provided a plain, speedy and adequate remedy at law with the right of jury trial.

As the complaint fully shows, and the order to show cause and the judgment, it was not an attempt to protect some one in possession from interference, but the plain proposition of ejecting the possessor and recovery of possession by the one out of it. If that was a wrong it was past. There would be more reason to supplant the action of replevin by an equity suit than this, for personal property can be concealed and transferred.

If such a proceeding as this lies, there would have been no necessity for a forcible entry and detainer act.

16 Ency. of Law, 2d ed., 352 et seq., 362 and 364.

The plaintiff did not allege that she desired to enter into the possession nor occupy the premises. She asked extraordinary relief, saying the defendants were insolvent, yet she offered no bond to them, nor was she required to give them one.

The Court further erred in rendering judgment upon plaintiff's motion against the defendants upon the pleadings as fraud. The only motion for judgment upon the pleadings authorized by the Alaska Code of Procedure is the defendants' motion.

Sec. 64, Part IV, Carter's Codes, p. 158.

If we are to consider the plaintiff's motion as a demurrer or in the nature of a motion upon the bill and answer, turning to the answer it is seen that the allegations of paragraphs 3, 5 and 6 of the complaint were denied; that is, it was denied that plaintiff had kept the covenants of the lease; that the defendants were insolvent, and that there was not a plain, speedy and adequate remedy at law. The denial of paragraph 3 tendered an issue on the merits, for if she had broken the covenants of the lease the defendants had the right to re-enter.

Turning to the affirmative defense disclosed by the answer, it would appear that an abandonment of such property as described in the answer would be the commission of waste upon the estate and justify the forfeiture de-

clared by the defendants; at any rate, it was such an abandonment as disclosed by the answer as justified the re-entry of the landlord for the purpose of caring for the premises.

18 Ency. of Law, 2d ed., 304.

The answer sets up that a new oral agreement for a consideration was made after the written lease and the entry under it, whereby the plaintiff, besides the cash rent to be paid, disposed of her goodwill and efforts to promote the liquor business of the defendants, and that the plaintiff conspired with a competitor of defendants, and fraudu-

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The answer shows a perfor ance of the new contract, till the forfeiture claimed. It was either a legal binding agreement or it was void.

Appellants claim it was the former. If it was, then certainly they have plead a gross violation and breach of its terms authorizing the declaration of the forfeiture of the lease.

If it was void, the plaintiff was a tenant at will from the beginning, and defendants had the right to re-enter at any time.

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The answer discloses a new agreement. It was after the first written one, and was therefore not an attempt to vary its terms.

It was not to lease for a longer period than one year.

Carter's Codes, sec. 1044, p. 354.

The answer shows a performance of the new contract, till the forfeiture claimed. It was either a legal binding agreement or it was void.

Appellants claim it was the former. If it was, then certainly they have plead a gross violation and breach of its terms authorizing the declaration of the forfeiture of the lease.

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McAdam on Landlord and Tenant, chapter 12.
18 Am. & Eng. Ency., 2d ed., 184 and cit., note 7.

If an illegal arrangement or agreement between the parties was disclosed by the answer, the Court would have refused relief to either party. The answer not being denied, the conclusion follows that the lower court must have considered the agreement plead in the affirmative portion of the answer as legal and binding, but that the plaintiff's acts did not justify a re-entry by the landlord.

In this the lower court was clearly in error, for it is difficult to show a more perfect type of fraud practiced than that disclosed by the answer as worked by the plaintiff. The only reasonable explanation of her abandonment of the premises immediately after paying a large monthly rental in advance is the one as cited and alleged as a fact by the answer and not denied.

Either this fraud or the abandonment itself justified a re-entry and rescission of the contract by the defendants, and the rent having been paid as a part of the scheme and a portion of the term for which payment was made having expired before the fraudulent abandonment and other acts during which time the occupancy of the premises for which rent was paid having continued, there was no obligation upon the part of the defendants to tender any part of such rent in order to rescind.

It will be noted that the Court found none of the facts on which it was sought to base a claim to equitable jurisdiction. Defendants had denied insolvency. The Court

could not proceed to judgment on the face of it without evidence, and there was none.

The only basis of the equity jurisdiction sought and attempted to be exercised was the preventive relief—the injunctive relief prayed. Yet the Court did not find plaintiff entitled to any; nor was any awarded.

The Court simply made a decree as to the title to the property.

For the foregoing reasons it is respectfully submitted that the Court erred in the respect of which complaint is made, and that an original decree of dismissal of the plaintiff's complaint should be granted by this Court.

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Attorneys for Appellants.

EDWARD E. CUSHMAN,
Of Counsel.